

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1027

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PJS

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA

Respondents

-v-

GEORGE GREEN,

Appellant

APPELLANT'S BRIEF

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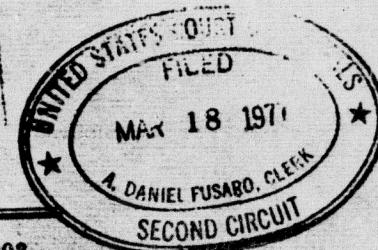


TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Question Presented	1
The Facts	2
POINT I - Appellant Was Denied a Speedy Trial	3
Conclusion	6

TABLE OF CASES

<u>Barker v. Wingo</u> , 407 U.S. 514, 530 (1972)	5
<u>United States v. Lasker</u> , 481 F. 2d 229, 233, (2d Cir. 1973)	4
<u>United States v. Roberts</u> , 515 F. 2d 642, 645 (1975) . .	3
<u>U.S. v. Salzmann</u> , (slip opinion dec. 9/28/76, number 76-1357)	4
<u>U.S. v. Vispi</u> , (slip opin. dec. 11/15/76 No. 76-1250)	5

STATUTES

Title 18 U.S.C. Section 500	1
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

- against -

GEORGE W. GREEN,

Appellant

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered December 16, 1976 in the United States District Court for the Southern District of New York, Honorable Kevin Thomas Duffy presiding. As a consequence of a conviction by a plea of guilty, appellant was sentenced to a term of imprisonment of two (2) years on counts 1 to 6 of the indictment, each to run concurrently with each other, and to run concurrently with a sentence appellant is presently serving in the United States District Court of South Carolina, Charleston Division, for receiving stolen money orders, a violation of Title 18 U.S.C. Section 500.

QUESTION PRESENTED

Did the delay in disposing of this matter deny appellant a speedy trial in violation of the United States Constitution and this Court's rules for prompt disposition of criminal cases?

THE FACTS

Appellant was arrested on May 20, 1975 (A 11). On May 22, 1975 he was released on bail by Honorable Charles J. Hartenstine a Magistrate in the Southern District (A 11). The matter appeared before the Magistrate six times until dismissed on November 12, 1975 (A 11). During that time appellant had received permission from the Magistrate to travel to South Carolina to attend to a federal criminal prosecution relating to a weapons charge (A 48). Appellant was convicted of that charge and incarcerated at the Federal Correction Center in Tallahassee, Florida (A 51).

Meanwhile an absent appellant was arraigned before Honorable Robert J. Ward in the Southern District of New York and a plea of not guilty was entered on appellant's behalf on November 17, 1975 (A 42-44). The next day November 18, 1975 the prosecution filed a notice of readiness (A 8). On May 4, 1976 the United States Attorney's office was granted a writ of habeas corpus ad prosequendum and appellant was brought to New York on March 11, 1976 (A 9). Appellant remained in custody at the Metropolitan Correction Center from March 11, 1976 to December 7, 1976 when this matter was finally disposed of by a plea of guilty (A 1, 2).

In the interim motions for dismissal of the indictment on the grounds of a violation of the constitutional mandate and this Court's rules for a speedy trial were made and denied (A 19-37). As early as March 8, 1976 appellant pro se forwarded

a motion for dismissal to this Court (A 15). However it was not until July 14, 1976 that the Court denied appellant's motion for dismissal (A 18). Denials of two other applications - dated July 19, 1976 and September 13, 1976 followed (A 1). Appellant languished in jail until December 1, 1976 when the case was placed on the calendar (A 1). And on December 7, 1976 appellant pled guilty to six (6) counts of the twelve (12) count indictment - reserving his right to appeal the Court's denial of the application to dismiss the indictment for failure to afford appellant a speedy trial (A 54).

POINT I:

APPELLANT WAS DENIED A SPEEDY TRIAL.

An accused sitting in the Metropolitan Correction Center cannot compel the authorities to act upon his case. He can only petition the Court. It is up to the Court to act. And when the Court fails to act it should not be the petitioner who is punished.

As this Court stated in United States v. Roberts, 515 F. 2d 642, 645 (1975):

"The Sixth Amendment guarantee of a speedy trial gives recognition to an accused's significant stakes - psychological, physical and financial - in prompt termination of a proceeding, which may ultimately deprive him of life, liberty and property... (t)he speedy trial clause applies with full force at least until a guilty plea has been entered by the defendant and accepted by the Court."

Again in U.S. v. Salzmann, (slip opinion dec. 9/28/76, number 76-1357) at page 36 this Court expressed its concern for prompt justice:

" case has brought an increased awareness of the vital importance, to both society and accused, of a speedy trial. The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is in prison awaiting trial, lengthy detention eats at the heart of the system founded on the presumption of innocence. Where a defendant is not detained prior to trial, the mere pendency of the indictment for a substantial period can create great hardships. It may 'disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloguy, and create anxiety on him, his family and friends... Moreover, we cannot emphasize sufficiently the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for society deprives itself on affording fair trials. In addition, the accelerating crime rate and the mergence of procedures to make the criminal process duly even handed have placed heavy burdens on court dockets. It is essential therefore that the courts rise to the challenge by avoiding the sort of fatalism 'that undermines the court's deterrent effect by demonstrating that justice is not swift and certain but slow and faltering'..."

"...(T)he primary purpose of the Prompt Disposition Rules was to vindicate the strong public interest and prompt resolution of criminal prosecutions it was the intent of the Circuit Counsel to stimulate the District Courts and counsel to resolve criminal cases expeditiously." (U.S. v. Lasker, 481 F. 2d 229, 233, (2d Cir. 1973).

A computation of the time that appellant had languished in jail after his return to New York and until his case was brought before the Court - March 1976 to December 1976 - nine (9) months exceeds the Court's time limit set out in the various plans for "speedy disposition of criminal cases" - 180 days. Allowing the time it took to prepare and consider motions would only ~~tole~~ the statute at most a month. However these motions were for dismissal for failure to provide a speedy trial. That the government filed a notice of readiness within six (6) months of appellant's arrest is of no benefit to appellant - the Court was not prepared to try the case until December 1, 1976.

While the length of delay was not as long as U.S. v. Vispi, (slip opin. dec. 11/15/76 No. 76-1250) - the prejudice was greater. Appellant's stay at the Metropolitan Correctional Center deprived him of an opportunity for an early parole in the South Carolina case. In U.S. v. Vispi this Court weighing all of the factors outlined in Barker v. Wingo, 407 U.S. 514, 530 (1972) dismissed the indictment although "specific handicaps attributable to the post-informational delay in the present case are difficult to pinpoint." Appellant's handicap is specific - loss of an opportunity for early parole in South Carolina. Having met the other elements of Barker v. Wingo, supra, (1) delay; (2) without reason; and (3) numerous assertions of his right to a speedy trial, the indictment should be dismissed.

CONCLUSION:

THIS INDICTMENT SHOULD BE DISMISSED.

Respectfully submitted,

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ROSENTHAL

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 18 day of ~~XXXX~~ March 1977 deponent served the within ~~fd 185~~ upon

U.S. Atty. So. Dist. of NY

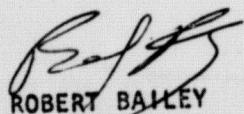
attorney(s) for

Respondent

in this action, at

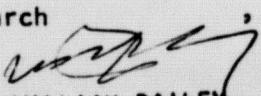
1 St. Andrews Pl, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.



ROBERT BAILEY

Sworn to before me, this 18 day
of March, 1977



WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978